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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Sentinel Insurance Company Limited,

No. CV-22-00289-PHX-DLR

10 Plaintiff,

**ORDER**

11 v.

12 Head to Toe Therapy Incorporated, et al.,

13 Defendants.  
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16 Plaintiff Sentinel Insurance Company, Ltd. brought this interpleader action to have  
17 the Court resolve disputed claims to the proceeds of an insurance policy issued by Plaintiff  
18 to Head to Toe Therapy, Inc. (“HTT”), Policy No. 59 SBA BC2122 SC (“Policy”). The  
19 proceeds, \$779,999.96, represent the amount due under the Policy for fire loss that occurred  
20 at HTT’s business personal property on February 25, 2021. Defendants Sunflower Bank,  
21 N.A. (“SBNA”) and Jazi Kat LLC (“Jazi Kat”) claim respective interests in the disputed  
22 funds.<sup>1</sup> On March 14, 2023, the Court granted Plaintiff’s unopposed motion to deposit the  
23 funds into the Registry of the Court. (Doc. 90.) Then, on April 3, 2023, the Court granted  
24 Plaintiff’s motion for discharge of further liability and dismissed Plaintiff with prejudice

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26 <sup>1</sup> Jazi Kat’s counsel is also representing Defendants HTT, Bridget O’ Brien (“O’  
27 Brien”), and Jazi Kat 4649 Rockridge LLC (“Jazi Kat 4659”). At a telephonic oral  
28 argument on March 28, 2023, Jazi Kat’s counsel indicated to the Court that both HTT and  
Jazi Kat are making claims to the disputed funds. (Doc. 99 at 3–4.) However, counsel’s  
pending motion only argues that Jazi Kat is entitled to the funds. (Docs. 109-1, 109-2.)  
Given there are no arguments before the Court that HTT, Jazi Kat 4649, or O’Brien are  
entitled to the funds, this order will address only the dispute between SBNA and Jazi Kat.

1 from the case. (Doc. 95.)

2 Pending before the Court are SBNA's and Jazi Kat's cross motions for summary  
3 judgment, which are fully briefed.<sup>2</sup> (Docs. 91, 101, 109-1, 109-2, 110, 111.) For the  
4 following reasons, the Court grants SBNA's motion for summary judgment and denies Jazi  
5 Kat's motion.<sup>3</sup>

## 6 I. BACKGROUND

7 Bridget O'Brien was the sole shareholder of HTT. (Doc. 91–1 at 5.) In October  
8 2019, O'Brien sold and transferred all HTT shares to Vickie Simpson. (*Id.* at 10–24.) To  
9 fund this sale, HTT obtained a \$3,000,000 loan from SBNA. (*Id.* at 3, 12–18.) On  
10 October 31, 2019, HTT and SBNA executed a Business Loan Agreement, a Promissory  
11 Note, and a Commercial Security Agreement. (*Id.* at 12–32.) Under the Security  
12 Agreement, HTT granted SBNA a security interest in all of HTT's assets, including “[a]ll  
13 inventory, equipment, accounts . . . , all insurance refunds relating to the foregoing property  
14 . . . whether now existing or hereafter arising . . . and all products and proceeds (including  
15 but not limited to all insurance payments) of or relating to the foregoing property.” (*Id.* at  
16 3, 24.) The Security Agreement further clarified that SBNA's security interest in the HTT's  
17 “collateral” includes “all insurance proceeds and refunds of insurance premiums.” (*Id.*)

18 Both the Security Agreement and the Loan Agreement affirmed that SBNA had a  
19 lien priority over HTT's collateral. The Security Agreement provided that HTT “holds  
20 good and marketable title to the Collateral, free and clear of all liens and encumbrances  
21 except for the lien of this Agreement.” (*Id.* at 26.) And the Loan Agreement stated that

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23 <sup>2</sup> Jazi Kat's motion for summary judgment (Doc. 109-1) is untimely since it was  
24 filed after the Court-ordered deadline for dispositive motions and without leave to do so.  
25 Generally, the Court will strike untimely motions; however, the Court declines to do so in  
26 this instance for three reasons. First, Jazi Kat's arguments for why the Court should deny  
27 SBNA's motion for summary judgment are substantively the same arguments for why the  
28 Court should grant summary judgment in Jazi Kat's favor. Second, even if Jazi Kat had not  
29 moved for summary judgment, the Court could grant summary judgment *sua sponte*.  
30 *Gonzales v. CarMax Auto Superstores, LLC*, 840 F.3d 644, 654–55 (9th Cir. 2016). Third,  
31 Defendant SBNA was afforded two replies to Jazi Kat's motion (*see* Docs. 110, 111) and  
32 is not prejudiced by the Court declining to strike Jazi Kat's motion.

<sup>3</sup> Oral argument is denied because the issues are adequately briefed, and oral  
argument will not assist the Court in reaching its decision. *See* Fed. R. Civ. P. 78(b); LRCiv.  
7.2(f).

1 HTTP “has not entered into or granted any Security Agreements or permitted the filing or  
2 attachment or any Security interests on or affecting any of the Collateral directly or  
3 indirectly . . . that would be prior or that may in any way be superior to [SBNA’s] Security  
4 Interests and rights in and to such Collateral.” (*Id.* at 13.) To perfect its security interest in  
5 HTTP’s collateral, SBNA filed a Uniform Commercial Code (“UCC”) Financing Statement  
6 with the Arizona Secretary of State on November 7, 2019. (*Id.* at 34.) The Financing  
7 Statement listed the same collateral as listed in HTTP and SBNA’s Security Agreement.  
8 (*Id.*)

9 HTTP is the named insured under the Policy at issue here. (*Id.* at 8.) Before SBNA’s  
10 loan funded to HTTP, the Policy listed Jazi Kat and First Fidelity Bank as “Loss Payees”  
11 and Western State Bank under the “Lender’s Loss Payable” endorsement. (*Id.*) As part of  
12 the Loan Agreement with SBNA, however, HTTP was required to provide insurance  
13 coverage on its collateral and to name SBNA under the “Lender Loss Payable”  
14 endorsement on the Policy. (Doc. 91-1 at 42.) Insurance coverage had to be in place by the  
15 loan closing date of October 31, 2019. (*Id.*) In anticipation of the loan’s closing date, HTTP’s  
16 accountant emailed Summit Insurance Advisors (an entity-agent of Plaintiff) on October  
17 28, 2019, requesting Summit name SBNA as the lender loss payee for HTTP’s Business  
18 Personal Property and issue a certificate of insurance reflecting this change to the Policy.  
19 (*Id.* at 8; Doc. 91-2 at 32–35.) Summit internally approved this request and, on October 29,  
20 2019, emailed HTTP an ACORD Certificate of Liability Insurance, designating SBNA as  
21 the “Certificate Holder,” “Additional Insured,” and “Lender Loss Payee” on the Policy.  
22 (*Id.* at 32–35, 38.)

23 Despite approving HTTP’s request that SBNA be designated as the lender loss payee  
24 on the Policy and despite issuing a certificate of insurance reflecting this, Summit  
25 discovered in 2021 that the Policy had not been officially changed back in October 2019.  
26 (*Id.* at 45.) In a deposition, a Summit representative testified that HTTP’s Policy should have  
27 been changed in October 2019 to identify SBNA as the lender loss payee. (*Id.* at 44–45.)  
28 However, Summit discovered in April 2021 that its employee had failed to make the

1 appropriate change back in October 2019. (*Id.*) As a result, Summit enacted “a policy  
2 change to reflect what should have been done back in October of 2019.” (*Id.* at 45.) The  
3 April 2021 policy change replaced Western State Bank with SBNA under the “Lender’s  
4 Loss Payable” endorsement. (*Id.* at 29.) The change also deleted First Fidelity Bank as a  
5 loss payee.<sup>4</sup> (*Id.*) This change did not, however, alter Jazi Kat’s listing as a “loss payee”  
6 under the Policy. (*Id.*)

7 HTTP ultimately defaulted on its loan with SBNA, resulting in SBNA initiating a  
8 collection action in the Maricopa County Superior Court. (*Id.* at 5–6.) On March 15, 2022,  
9 the court entered judgement in SBNA’s favor in the principal amount of \$3,444,588.14  
10 plus interest accruing thereon. (*Id.*)

11 On February 25, 2021, fire loss occurred at HTTP’s business personal property. (Doc.  
12 6 at 4.) Plaintiff acknowledged coverage for the fire damage under the Policy. (Doc. 6.)  
13 After adjusting HTTP’s claim under the Policy for the fire loss, Plaintiff filed this  
14 interpleader action under 28 U.S.C. § 1335 and Federal Rule of Civil Procedure 22. (*Id.*)  
15 Plaintiff asserted that the defendants, including SBNA and Jazi Kat, have conflicting  
16 claims to the \$779,999.96 in insurance proceeds. (*Id.*; Doc. 79 at 2.) On April 10, 2023,  
17 Plaintiff deposited the disputed funds into the Court’s registry. (Doc. 98.) Although this  
18 interpleader names numerous defendants, only SBNA and Jazi Kat have submitted  
19 competing claims to this Court. (*See* Docs. 91, 109-1.) SBNA contends that it is entitled to  
20 the funds because both Plaintiff and HTTP represented, as well as intended, that SBNA be  
21 the “Lender Loss Payee” for HTTP’s business personal property under the Policy. SBNA  
22 also argues that separate from its status as the Lender Loss Payee under the Policy, SBNA  
23 is the sole secured creditor with a perfected lien on and security interest in HTTP’s insurance  
24 proceeds. (Doc. 91.) Jazi Kat contends that it is entitled to the funds because, at the time of  
25 the fire loss, Jazi Kat was the first named loss payee under HTTP’s Policy and SBNA was  
26 not yet added as a loss payee. (Doc. 109-1.)

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<sup>4</sup> First Fidelity Bank was deleted as a loss payee because a portion of SBNA’s loan  
to HTTP was used to fully payoff HTTP’s obligations to First Fidelity. (Doc. 91-2 at 18.)

## II. SUMMARY JUDGMENT STANDARD

When parties submit cross-motions for summary judgment, the Court must consider each motion on its own merits. *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). The Court will grant summary judgment when, viewing the facts in a light most favorable to the nonmoving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of a case, and a dispute is genuine “if the evidence is such that a reasonable jury could return a verdict” for the other side. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In interpleader actions brought under 28 U.S.C. § 1335, federal district courts are “required to apply the substantive law that a court of the forum state would apply.” *Equitable Life Assurance Soc. of U.S. v. McKay*, 837 F.2d 904, 905 (9th Cir. 1988). Accordingly, Arizona substantive law governs this interpleader action.

## III. ANALYSIS

SBNA contends that it is entitled to all of the disputed funds because it is the rightful “Lender Loss Payee under the Policy, and because SBNA is the only lender holding a perfected security interest in HTT’s [business personal property] or the proceeds thereof, which includes the insurance proceeds [here].” (Doc. 91 at 2–3.) Jazi Kat concedes that SBNA is entitled to \$300,000 of the disputed funds because of “SBNA subrogation.” However, Jazi Kat contends that it is entitled to the remaining \$479,999.96 because Jazi Kat was the first listed “loss payee” on the Policy, whereas SBNA was not named on the Policy at the time of the loss. (Doc. 109-1 at 2–3, 5.) For the following reasons, the Court finds that there is no genuine dispute as to any material fact and that SBNA is entitled to entirety of the disputed funds as a matter of law.

### A. SBNA has a first position perfected security interest in HTT’s insurance proceeds.

The Court first finds that there is no genuine dispute of fact that SBNA has a perfected first position security interest in all of HTT’s assets, which includes insurance

1 proceeds. Jazi Kat admits that “SBNA has a security interest in the assets of [HTT].” (Doc.  
 2 109-2 at 3.) Under Arizona law, “[t]he attachment of a security interest in collateral gives  
 3 the secured party the rights to proceeds.” A.R.S. § 47-9203(F). Proceeds include “insurance  
 4 payable by reason of . . . damages to the collateral.” *Id.* § 47-9102 (A)(64)(e). “A security  
 5 interest in proceeds is a perfected security interest if the security interest in the original  
 6 collateral was perfected.” *Id.* § 47-9315(C). And a security interest in collateral is perfected  
 7 upon the filing of a financing statement. *Id.* § 47-9310(A).

8 Under Article Nine of Arizona’s UCC, a security agreement “is effective according  
 9 to its terms between the parties, against purchasers of the collateral and against creditors.”  
 10 *Id.* § 47-9201(A). “The effect of this section is to give the Article Nine secured party, upon  
 11 a debtor’s default, priority over ‘anyone, anywhere, anyhow’ except as otherwise provided  
 12 by the remaining [UCC] priority rules.” *See Valley Nat. Bank of Ariz. v. Cotton Growers*  
 13 *Hail Ins., Inc.*, 747 P.2d 1225, 1228 (Ariz. Ct. App. 1987) (quoting *Griffin v. Continental*  
 14 *Am. Life Ins. Co.*, 772 F.2d 671, 673 (11th Cir. 1984)).

15 Here, SBNA’s perfected first position interest in HTT’s collateral, including any  
 16 insurance proceeds, is evidenced by SBNA’s UCC financing statement, which SBNA filed  
 17 with the Arizona Secretary of State’s office. Jazi Kat neither disputes SBNA’s perfected  
 18 interest nor points to evidence demonstrating that Jazi Kat has a conflicting perfected  
 19 security interest. Indeed, Jazi Kat proffers no evidence that it has a security interest at all  
 20 or that it even is a creditor of HTT. Instead, Jazi Kat makes a bald claim that although  
 21 SBNA has a security interest in HTT’s assets, the disputed funds at issue here “are the asset  
 22 of Jazi Kat, not HTT.” (Doc. 109-2.) Not so. It is undisputed that the interpleaded funds  
 23 represent the amount due under the Policy for the fire loss that occurred at HTT’s business  
 24 property in February 2021. It is further undisputed that the insured on the Policy is HTT.  
 25 Jazi Kat’s legally and factually unsupported claim that the insurance proceeds are not  
 26 among HTT’s assets is unpersuasive. *See Valley Nat. Bank*, 747 P.2d at 1228 (holding that  
 27 insured’s interest in the insurance proceeds at the time loss occurs is sufficient to allow  
 28 bank’s security interest to attach). Given that SBNA is an Article Nine secured party and



1 that HTT has defaulted on its loan in excess of the disputed funds at issue here, SBNA has  
 2 priority over any other party to the insurance proceeds. Jazi Kat fails to point to a UCC  
 3 priority rule that would preclude this result. Nor does Jazi Kat point to evidence  
 4 establishing that its claim to the disputed funds is superior to SBNA's perfected security  
 5 interest.

6 **B. SBNA is entitled to reformation of the Policy as a matter of law.**

7 Jazi Kat repeatedly emphasizes that at the time of the loss, Jazi Kat was listed as the  
 8 first loss payee on the Policy, whereas SBNA was not listed on the Policy at all. (Doc. 109-  
 9 1 at 2–4.) Jazi Kat points to the holding in *Zaghi v. State Farm General Insurance Co.* to  
 10 assert that a creditor—like SBNA—that is not named in an insurance policy on the date of  
 11 the loss cannot recover insurance proceeds under that policy. 77 F. Supp. 3d 974, 975 (N.D.  
 12 Cal. 2015). Jazi Kat also points to *Zaghi* for the proposition that a creditor cannot  
 13 retroactively add himself to the policy. *Id.*

14 Jazi Kat's argument and reliance on *Zaghi* is unpersuasive. In *Zaghi*, the court held  
 15 that the creditor could not recover the insurance proceeds because the creditor failed to  
 16 allege sufficient facts that the insurer *intended* to list the creditor on the Policy before the  
 17 date of the loss. *Id.* In this case, it is undisputed that both Summit (the insurer) and HTT  
 18 (the insured) intended for SBNA to be listed on the Policy back in October 2019. This is  
 19 demonstrated by Summit both internally approving HTT's request to designate SBNA as  
 20 the lender loss payee on the Policy and by Summit issuing a Certificate of Insurance in  
 21 October 2019, listing SBNA as the certificate holder, additional insured, and lender loss  
 22 payee on the Policy. It is also undisputed that but-for Summit's employee failing to process  
 23 the policy change in October 2019, SBNA would have been listed on the Policy as the  
 24 lender loss payee at the time of the fire loss. Jazi Kat even concedes that the reason SBNA  
 25 was not listed on the Policy at the time of the loss was "due to the insurance company's  
 26 administrative error." (Doc. 109-1 at 3.) The Court finds *Zaghi*'s facts distinguishable from  
 27 the facts in this case and thus the reasoning is inapposite.

28 Moreover, as the court in *Zaghi* notes, reformation of an insurance contract is proper

1 where the insured and the insurer both intended for the creditor to be named in the insurance  
 2 policy. *Id.*; see also *A. I. D. Ins. Servs. v. Riley*, 541 P.2d 595, 598 (Ariz. Ct. App. 1975)  
 3 (“Where the party applying for insurance states the facts to the agent and relies on him to  
 4 write the policy which will protect his interests, and the agent so understands, but fails by  
 5 mistake to so write the contract, the mistake is considered mutual and the insured is entitled  
 6 to reformation.”). Given that Summit and HTT intended to name SBNA as the lender loss  
 7 payee on the Policy in October 2019, SBNA is entitled to reformation of the Policy as a  
 8 matter of law. *Home Owners’ Loan Corp. v. Bank of Ariz.*, 94 P.2d 437, 442 (Ariz. 1939)  
 9 (“[T]he equitable remedy of reformation will not only be allowed as against original parties  
 10 and their heirs, but will also be granted as against the assignees, creditors, purchasers with  
 11 notice, and all others standing in privy.”) (internal quotation omitted).

12 **C. Any claim Jazi Kat has to the disputed funds is inferior to SBNA’s claim.**

13 Jazi Kat contends that “[e]ven if the insurance policy is reformed, [it] is still the first  
 14 loss payee, first in time, and therefore, superior to a later added loss payee.” To support its  
 15 “first in time, first in right” argument, Jazi Kat directs the Court’s attention to three  
 16 Supreme Court cases: *United States v. Equitable Life Assurance Society of U.S.*, 384 U.S.  
 17 323 (1966); *United States v. Pioneer American Insurance Co.*, 374 U.S. 84 (1963); and  
 18 *United States v. City of New Britain, Conn.*, 347 U.S. 81 (1954). As Jazi Kat correctly  
 19 notes, these cases hold that a federal tax lien is superior to other liens not choate at the time  
 20 the federal tax lien is filed. Jazi Kat argues that although “first in time, first in right”  
 21 doctrine originally arose in the tax-lien context, it has been extended to non-tax lien areas  
 22 such as in *Connecticut-Mutual Life Insurance Co. v. Carter*. 446 F.2d 136, 138–39 (5th  
 23 Cir. 1971) (holding that federal government’s lien remained subordinate to private lien  
 24 because “[government], operating as a private lender, voluntarily took a second mortgage  
 25 fully aware . . . of the then existent attorneys’ fees clause in the first mortgage.”).

26 The Court is not persuaded. First, it is not clear how any of the cases Jazi Kat cites  
 27 support its claim to the disputed funds. It is true that these cases refer to the principle of  
 28 “first in time, first in right,” but that doctrine was used in the context of *competing liens*.



1 Here, only SBNA has established a lien in HTT's assets and insurance proceeds; Jazi Kat,  
 2 on the other hand, has proffered no evidence that it has a competing lien in HTT's assets  
 3 or the insurance proceeds. Second, even assuming Jazi Kat has a competing lien, Jazi Kat  
 4 has proffered no evidence that such a lien was perfected or that it was perfected *first in*  
 5 *time*. A.R.S. § 47-9322(A)(2) ("A perfected security interest . . . has priority over a  
 6 conflicting unperfected security interest."). To the contrary, the record demonstrates that  
 7 SBNA not only has a perfected interest in HTT's insurance proceeds, but that SBNA  
 8 perfected this interest first in time. Take, for example, the undisputed warranties HTT made  
 9 to SBNA when it granted SBNA an interest in its assets. HTT warranted that it held good  
 10 and marketable title to the collateral "*free and clear of all liens*" and that HTT had not  
 11 granted any security interests affecting the collateral that would be prior or superior to  
 12 SBNA's interest. Jazi Kat fails to rebut any of this. So even under the "first in time, first in  
 13 right" doctrine for competing liens, SBNA is entitled to the funds.

14 Moreover, Arizona case law supports the finding that SBNA's interest as *lender loss*  
 15 *payee* under the Policy is superior to Jazi's Kat's interest as *loss payee*. As Arizona courts  
 16 have explained, a loss payee is defined as "a mere appointee to receive the proceeds to the  
 17 extent of his interest . . . dependent upon the existence of an insurable interest in such  
 18 appointee . . . [I]f the policy is not collectible by the insured, the appointee, likewise,  
 19 cannot recover thereunder." *Valley Nat. Bank of Ariz. v. Ins. Co. of N. Am.*, 836 P.2d 425,  
 20 428 (Ariz. Ct. App. 1992) (quoting *Granite State Ins. Co. v. Emps. Mut. Ins. Co.*, 609 P.2d  
 21 90, 91–93 (Ariz. Ct. App. 1980)). In contrast, a lender loss payable clause "is, in effect, an  
 22 independent agreement with the mortgagee, creating an independent contract between the  
 23 [insurance] company and the mortgagee for the latter's benefit." *Id.* Consequently, "in a  
 24 loss payee context, the loss payee's rights are derivative [of the insured's rights], while in  
 25 a [lender loss payable] context, there is a separate contract between the insurer and  
 26 mortgagee which is independent from the insurer-named insured relationship." *Id.* Here,  
 27 Jazi Kat is the loss payee, whereas SBNA, as the mortgagee, is the lender loss payee. Any  
 28 interest Jazi Kat has in the insurance proceeds is derivative of HTT's interest. Given the

1 default judgment against HTT and given SBNA's perfected security interest in HTT's  
2 insurance proceeds on its collateral, HTT has no right to collect the proceeds. In turn,  
3 because HTT cannot collect the insurance proceeds, Jazi Kat likewise cannot collect.

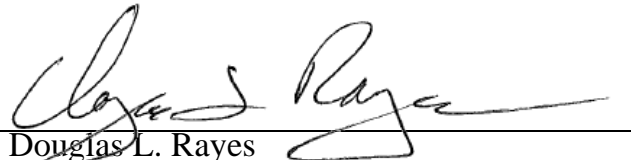
4 In sum, the Court finds that there is no issue of any material fact and that SBNA is  
5 entitled to the entirety of the disputed funds as a matter of law. A rational trier of fact,  
6 taking the record as a whole, could not find that Jazi Kat's claim to the disputed funds is  
7 superior to SBNA's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding  
8 that summary judgment may be entered "against a party who fails to make a showing  
9 sufficient to establish the existence of an element essential to that party's case, and on  
10 which that party will bear the burden of proof at trial"). Accordingly, the Court grants  
11 SBNA's motion for summary judgment and denies Jazi Kat's motion. The Court also  
12 denies without prejudice SBNA's request for attorneys' fees because it does not comply  
13 with LRCiv 54.2.

14 **IT IS ORDERED** that SBNA's Motion for Summary Judgment (Doc. 91) is  
15 **GRANTED** and Jazi Kat's Cross Motion for Summary Judgment (Doc. 109-1) is  
16 **DENIED**. SBNA is hereby entitled to the entirety of the interpleaded funds amounting to  
17 \$779,999.96, which Plaintiff deposited into the Court's Registry on April 10, 2023, and  
18 any accrued interest or any earned interest.

19 **IT IS FURTHER ORDERED** that SBNA's request for attorneys' fees is denied  
20 without prejudice. If SBNA so chooses, it may move for attorneys' fees and costs in a  
21 manner that complies with LRCiv 54.2.

22 **IT IS FURTHER ORDERED** that the Clerk of the Court is directed to terminate  
23 the case.

24 Dated this 17th day of November, 2023.

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Douglas L. Rayes  
United States District Judge